Public Prosecutor v Mohd Musa bin Ahmad

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 42S-33 OF 2011
SAMSUDIN HASSAN JC
22 MARCH 2012

Criminal Law — Penal Code — s 376 — Rape — Accused convicted of raping 14 year old girl — Victim giving birth to a baby — Accused related to victim — Sentenced enhanced on appeal to 12 years imprisonment and three strokes of cane

Criminal Procedure — Sentencing — Appeal against sentence — Rape — Inadequacy of sentence — Whether plea of guilty a mitigating factor — Offence containing aggravating circumstances requiring deterrent sentence — Public interest demanding deterrent sentence — Whether serious crime — Whether sentence manifestly inadequate

Criminal Procedure — Sentencing — Plea of guilty — Whether plea of guilty automatically a mitigating factor — Circumstances unfavorable to consider plea of guilty

The respondent was convicted on his own plea of guilty to a charge of rape under s 376 of the Penal Code and was sentenced to 24 months imprisonment and one stroke of cane by the learned sessions court judge ('SCJ'). The public prosecutor appealed against the inadequacy of the sentence. The respondent had raped a 14 year old girl who later gave birth to a baby. The respondent was the younger brother to the brother in law of the victim's mother. According to the victim, she went to the respondent's house during school holidays when the respondent had lured her and raped her.

Held:

(1) Pleads of guilty has always been considered as a mitigating factor. However, a guilty plea ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration. Its application in favour of the accused depends on the circumstances of each case. There is no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment. The types of circumstances which may be unfavourable to the allowance in respect of a plea of guilty are: (i) where the imposition of a long sentence, if necessary the maximum is

considered to be necessary for the protection of the public; (ii) where the seriousness of the offence is such that the public interest requires the imposition of the maximum sentence; (iii) where the plea of guilty is a tactical nature; and (iv) where the plea is practically inevitable (see para 8).

(2) The learned SCJ was correct in treating a plea of guilty as a mitigating factor. By allowing the respondent a discount for pleading guilty, the learned SCJ underscored the advantage of lightening the court's workload, thus relieving delays and backlogs, saving the cost/expenses and inconvenience of trial and saving victim and witnesses from the trauma involved in giving evidence at the trial (see para 11).

(3) However, the offence to which the respondent had pleaded guilty contained many aggravating circumstances which required a deterrent sentence to be imposed on the respondent. The sentence imposed by the learned SCJ was manifestly inadequate in the circumstances prevalent in this case (see para 12).

(4) It is trite law that the court in imposing sentence in rape cases must take into consideration of public interest which demand that deterrent sentence be given. Rape is a serious crime. The offence of rape is a rampant offence in Malaysia justifying a deterrent sentence. Accordingly, the respondent's sentence was substituted with a sentence of 12 years imprisonment and three strokes of cane (see para 15).

[Bahasa Malaysia summary

Responden disabitkan atas pengakuan bersalahnya kepada tuduhan rogol di bawah s 376 Kanun Keseksaan dan dihukum 24 bulan penjara dan satu sebatan rotan oleh hakim mahkamah sesyen ('HMS'). Pihak pendakwaan merayu terhadap hukuman yang tidak mencukupi tersebut. Responden merogol budak perempuan berumur 14 tahun yang kemudiannya melahirkan anak. Responden adalah adik lelaki kepada abang ipar emak mangsa. Mengikut mangsa, dia pergi ke rumah responden semasa cuti sekolah apabila responden telah menggoda dan merogol dia.

Diputuskan:

(1) Pengakuan bersalah selalunya dipertimbangkan sebagai faktor peringanan. Walau bagaimanapun pengakuan bersalah patut dipertimbangkan berpihak tertuduh hanya apabila kesemua faktor lain dan keadaan sekeliling pelakuan kesalahan menjustifikasikan pertimbangan sedemikian. Pemakaiannya yang berpihak kepada tertuduh adalah bergantung atas keadaan setiap kes. Tiada peraturan automatik bahawa pengakuan bersalah atasnya sendiri memberikan hak kepada tertuduh kepada hukuman yang lebih ringan. Jenis keadaan yang mungkin tidak memihak kepada pemberian berkaitan pengakuan

bersalah adalah: (i) di mana pengenaan hukuman yang lama, jika perlu maksimum adalah dipertimbangkan sebagai perlu bagi perlindungan orang ramai; (ii) di mana keseriusan kesalahan sedemikian bahawa kepentingan awam memerlukan pengenaan hukuman yang maksimum; (iii) di mana pengakuan bersalah adalah bersifat taktikal; dan (iv) di mana pengakuan tersebut tidak dapat dielakkan (lihat perenggan 8).

(2) HMS yang bijaksana adalah betul dalam menguruskan pengakuan bersalah sebagai faktor peringanan. Dengan membenarkan responden diskaun untuk pengakuan bersalah, HMS yang bijaksana menekankan kelebihan dalam meringankan beban mahkamah, oleh itu mengurangkan kelewatan dan tunggakan, menjimatkan kos/perbelanjaan dan kesulitan perbicaraan dan menyelamatkan mangsa dan saksi-saksi daripada trauma yang terlibat dalam memberikan keterangan pada masa perbicaraan (lihat perenggan 11).

(3) Walau bagaimanapun, kesalahan yang mana responden mengaku bersalah mengandungi banyak keadaan teruk yang memerlukan hukuman berat dikenakan ke atas responden. Hukuman yang dikenakan oleh HMS yang bijaksana adalah jelas tidak mencukupi dalam keadaan lazim dalam kes ini (lihat perenggan 12).

(4) Adalah undang-undang nyata bahawa mahkamah dalam mengenakan hukuman dalam kes-kes rogol mesti mengambil pertimbangan terhadap kepentingan awam yang mana menuntut bahawa hukuman berat dijatuhkan. Rogol adalah jenayah yang serius. Kesalahan merogol adalah kesalahan yang berleluasa di Malaysia yang menjustifikasikan hukuman berat. Oleh itu hukuman responden digantikan dengan hukuman penjara 12 tahun dan tiga sebatan rotan (lihat perenggan 15).]

Notes

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3702–3770.

For cases on on plea of guilty, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4282–4335.

For cases on s 375 of the Penal Code, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2055–2092.

Cases referred to

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572, CA (refd)

Du Plooy v HM Advocate [2003] SCCR 640 (refd)

Mohamad bin Senik v PP [2005] 4 MLJ 164; [2005] 1 LNS 74, HC (refd)

Muhamat Yassin b Majali v PP [2007] MLJU 750; [2007] 1 LNS 567, HC (refd)

Ong Lai Kim v PP and other appeals [1991] 3 MLJ 111; [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376, HC (refd)
PP v Badron Zamanuddin [2005] 5 CLJ 493, HC (refd)
PP v Shari bin Mohd Shariff [2005] 4 MLJ 763; [2005] 5 CLJ 439, HC (refd)
R v Costen (1989) 11 Cr App Rep (S) 182, CA (refd)
R v March (2002) 2 Cr App R (S) 448, CA (refd)

Legislation referred to
Penal Code s 376

Umar Saifudin bin Jaafar (Deputy Public Prosecutor, Johor Legal Advisor Offices) for the appellant.
Mohd Musa bin Ahmad (Jabatan Penjara Sg Udang, Melaka) for the respondent.

Samsudin Hassan JC:

INTRODUCTION

[1] This is an appeal by the public prosecutor ('the appellant') against the decision of the learned sessions court judge ('SCJ') made on 17 February 2011, whereby the respondent was convicted on his own plea guilty to a charge under s 376 of the Penal Code and sentenced to 24 months imprisonment and one stroke of cane.

THE CHARGE

[2] The charge against the respondent was as follows:

> Amended Charge:
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> Bahawa kamu di antara bulan November 2007, jam lebih kurang 4.00 pagi bertempat di sebuah rumah beralamat Parit Sentang Batu, Mukim 4, Parit Sulong, di dalam Daerah Pontian, di dalam Negeri Johor Darul Ta'zim telah didapati merogol seorang perempuan Melayu bernama XXX, No. KPT: XXX berumur 14 tahun. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 376 Kanun Keseksaan.

(The name of the victim is substituted with (XXX) to protect her identity).

THE FACTS OF THE CASE

[3] The facts tendered by the prosecution (exh P2) may be translated as follows:

(a) on 13 September 2008 at about 10am, while the complainant (the victim's mother) was working at Pasaraya Moheng as a security guard, she

was approached by her daughter called Normah and informed her that her another daughter named XXX (victim) 14 years old, gave birth to a baby in toilet in their house at Kg Sepan Beruang, Benut, Pontian;

(b) the complainant then returned to their house and found that her daughter name XXX gave birth to a baby boy in the toilet of their house. The complainant made a call to the Klinik Kesihatan Benut. Later the complainant together with the victim and her son were taken to Hospital Pontian for medical examination;

(c) investigation revealed that, the victim admitted that the baby she conceived is result from a relationship with a man known as Cik Musa. Based on investigation, the complainant confirmed that Cik Musa is Musa bin Ahmad ('the accused') who is the younger brother to brother in law of the complainant where the accused brother had married a sister of the complainant;

(d) according to the victim, she went to the house of the accused at Parit Sentang Batu, Parit Sulong, Rengit at beginning of November 2007 during school holidays. At about 4pm, victim was invited by the accused to have sex. Then the accused raped her on that day; and

(e) according to the blood analysis, the victim and the boy named Muhd Amirul Aizatt was sent to the chemistry department at Petaling Jaya for paternity test. The test confirmed that the accused person and victim are the natural father and mother to the baby born on 13 September 2008.

[4] The following exhibits were also tendered by the prosecutions:

(a) P1: Amended charge;

(b) P2: Facts of the case;

(c) P3: Police report by the complainant;

(d) P4: Medical report;

(e) P5: DNA report; and

(f) P6: Birth certificate of the victim.

All these exhibits were admitted by the accused.

THE GROUND OF APPEAL

[5] Although the petition of appeal contained several grounds, the primary issues raised by the appellant were as follows:

(a) whether the learned SCJ had erred when failed to have sufficient regard to the following factors:

(i) sexual act committed on the victim by the accused blatantly in

breach of trustworthy and responsibility as elderly member of the family who happened to be the younger brother to brother in law of the complainant;

(ii) the victim was only 14 years old when the offence was committed against her;

(iii) the victim was lured to stay at the accussed house during the school holiday and was raped; and

(b) whether the sentence that had been imposed by the SCJ was manifestly inadequate.

[6] I shall now consider whether the SCJ had erred in principle in imposing on the respondent the sentence appealed against. The grounds of appeal are now separately discussed.

FIRST GROUND

[7] The fact that the respondent had pleaded guilty has always been considered as a mitigating factor. The rationale for making an allowance in respect of a plea of guilty was lucidly explained by Lord Justice General in *Du Plooy v HM Advocate* [2003] SCCR 640 para [10] as follows:

> [10] In England it is evident that there are two main justifications for making an allowance in respect of a plea of guilty. The first is the benefit of the plea to the administration of justice. Thus, in delivering the judgment of the Court of Appeal in *Byrne* [1997] 1 Cr App R (S) 165, Ognall J at p 166 pointed out that by pleading guilty an accused saved a considerable amount of public time and expense. To this may be added the sparing of witnesses from having to attend the trial to give evidence (Hussain at para 17). This factor is regarded as being of considerable importance in sentencing for sexual offences. In *Billam* (1986) 8 Cr App R (S) 48 Lord Lane LCJ stated, at p 51:
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> > The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence.
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> In *Millberry* [2003] 1 Cr App R 25, which was concerned with a case of rape, Lord Woolf LCJ stated at para 27 that the first reason why courts made allowance for a plea of guilty and the stage in the proceedings when this happened was because it was known that victims of rape could find it an extremely distressing experience to give evidence in open court about what had happened to them, even where their identities were protected. In para 28 he went on to say:
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> > Obviously the distress which is avoided is greater the earlier the victim is informed so the discount should be reduced if there is not an early plea. There is also the fact that the plea demonstrates that the offender appreciates how wrong

> his conduct was and regrets it. While it is desirable to avoid taking up the time of the court and incurring expense unnecessarily, this is less important in mitigation than the other two factors we have just mentioned.

The other justification which is highlighted in the English decisions is the recognition of what is involved in an accused's acceptance of his or her guilt. Thus in Byrne, Ognall J, again at p 166, explained that the reasons for which a discount was traditionally given for a plea of guilty included the following (we omit the factor to which we have already referred):

> … it is generally perceived as being the most cogent token of remorse and regret; secondly it is reinforced by the view that by pleading guilty a defendant inevitably forfeits whatever prospect he may have, however exiguous, of being acquitted by a jury … and lastly, he demonstrates by his plea an acceptance of the justification that he should be punished for his wrongdoing.

[8] However, it has been decided that a guilty plea ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration. Its application in favour of the accused depends on the circumstances of each case. There is no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment. In a number of English judgments, notably *R v Costen* (1989) 11 Cr App Rep (S) 182 and *R v March* (2002) 2 Cr App R (S) 448, there was a discussion of types of circumstances which may be unfavorable to the allowance in respect of a plea of guilty. According to the judgments, they include (a) where the imposition of a long sentence, if necessary the maximum is considered to be necessary for the protection of the public; (b) where the seriousness of the offence is such that the public interest requires the imposition of the maximum sentence; (c) where the plea of guilty is a tactical nature; and (d) where the plea is practically inevitable (see *Costen* at pp 184–185; and *March* at para 22).

[9] In the Malaysian Court of Appeal case of *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004] 2 CLJ 572, Augustine Paul JCA opined as follows:

> However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441; *Lee Say & Ors v Public Prosecutor* [1985] 2 CLJ 155; [1985] CLJ (Rep) 683). Its application in favour of an accused depends on the facts and circumstances of each case (see *Wong Kai Chuen Philip v Public Prosecutor* [1999] 1 MLJ 321; [1990] 1 LNS 146). Thus, as lucidly explained by Charles JA in *Leigh Nicholas Donnely v R* [1997] 91 A Crim R 550 at p 554:
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> > A court's attitude towards the fact of a plea of guilty is expected to act as an encouragement to enter such a plea. The issue with which the court is to be concerned is what weight should be given to it in the circumstances. The

A circumstances in which a guilty plea will not have any weight are varied. The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Loh Hock Seng & Anor v Public Prosecutor* [1980] 2 MLJ 13; [1979] 1 LNS 48; *Public Prosecutor v Oo Leng Swee & Ors* [1981] 1 MLJ 247; [1981] 1 LNS 109). Where public interest demands a deterrent sentence in the B circumstances of a particular case, then the effect of a guilty plea must also give way (see *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537; *Public Prosecutor v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181; [1998] 2 CLJ 370). A guilty plea cannot also be a powerful mitigating factor when effectively no defence to the charge is available to the accused (see *Public Prosecutor v Low Kak Wai* [1988] 3 C MLJ 123; [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268). If a plea of guilty is made too late in the trial it may also cease to have mitigating effect (see *Public Prosecutor v Dato' Nallakaruppan Solaimalai* [1999] MLJU 74; [1999] 2 CLJ 596). The absence of mitigating factors in favour of the accused like, for instance, the existence of previous convictions may also deprive the guilty plea of its effect. D There can therefore be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment (see *Public Prosecutor v Tia Ah Leng* [2000] 5 MLJ 401; [2000] 5 CLJ 614). Be that as it may, where there is a departure from the general rule the reasons for not treating the guilty plea as a mitigating factor must be reflected in the grounds of judgment (see *Tan Lay Chen v Public Prosecutor* [2001] 1 MLJ 135; [2000] 4 CLJ 492).

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[10] To summarise, it is not in doubt that whatever allowance or discount, if any, should be made in respect of a plea of guilty is a matter for the discretion of the court. There is no formal or rigid system of discounting.

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[11] In this instant appeal, the learned SCJ was correct in treating a plea of guilty as a mitigating factor. By allowing the respondent a discount for pleading guilty, the learned SCJ underscored the advantage of lightening the court's G workload, this relieving delays and backlogs, saving the cost/expenses and inconvenience of trial and saving victim and witnesses from the trauma involved in giving evidence at the trial. I have no doubt that a plea of guilty in this case can be a significant mitigating factor. I would have little hesitation in imposing maximum sentence on the facts of this case had the respondent put H the victim to trial and the ordeal of giving evidence.

[12] However, the offence to which the respondent had pleaded guilty contains many aggravating circumstances which requires a deterrent sentence to be imposed on the respondent. They are:

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(a) sexual act committed on the victim by the respondent blatantly in breach of trustworthy and responsibility accorded to him as elderly member of the family who happened to be the younger brother to brother in law of the complainant;

(b) the victim was only 14 years old when the offence was committed against her; and

(c) the victim was lured to stay at the respondent house during the school holidays.

It was evident from the facts of the case that the victim was raped by the respondent at his house.

[13] The respondent, in his submission, urged the court not to disturb the sentence imposed by the SCJ. According to him, 24 months imprisonment is a reasonable time period. He well knows that in many cases a prison term not only withers the life of the prisoner but spreads like a stain in ever-widening circle, blighting the lives of innocent members of the family. Every judge is painfully aware of what imprisonment without a son may mean to a prisoner's mother. But society must be protected, crime must be deterred, dangerous offender must be segregated and prisoners must be reformed.

SECOND GROUND

[14] I am in agreement with learned deputy public prosecutor that the sentence that had been imposed by the learned SCJ was manifestly inadequate in the circumstances prevalent in this case. The sentence of 24 months imprisonment and one stroke of cane does not reflect what has been handed down in other cases (see *Mohamad bin Senik v Public Prosecutor* [2005] 4 MLJ 164; [2005] 1 LNS 74 (sentence of 18 years and ten strokes of whipping upheld); *Public Prosecutor v Shari bin Mohd Shariff* [2005] 4 MLJ 763; [2005] 5 CLJ 439; (sentence of 12 years and six strokes of whipping for each of the charge upheld); *Public Prosecutor v Badron Zamanuddin* [2005] 5 CLJ 493, (sentence of 16 years and three strokes of whipping for each of the offence be varied to 16 years and six strokes of whipping for each of the offence) and *Muhamat Yassin b Majali v Public Prosecutor* [2007] MLJU 750; [2007] 1 LNS 567 (sentence of 15 years and one stroke of whipping upheld).

[15] It is trite law that the court in imposing sentence in rape cases must take into consideration of public interest which demand that deterrent sentence be given. Rape is a serious crime. The court should not discount the seriousness of rape as a crime. It is a highly reprehensible, both in moral sense and in its almost total contempt for the personal integrity of the female victim. It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome that will and capacity of the victim to resist. Rape is very often accompanied with physical injury to the victim and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is a public injury as well.

[16] The offence of rape is a rampant offence in Malaysia justifying a deterrent sentence. Thus, in *Ong Lai Kim v Public Prosecutor and other appeals* [1991] 3 MLJ 111; [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376, Zakaria Yatim J (as he then was) observed:

> The offence of rape is rampant in this country. The court will be failing in his duty if it does not impose a deterrent sentence in this case. The punishment must not only deter the appellants from committing a similar offence in the future but it must also deter others from committing such an offence. The punishment inflicted for grave offence including the crime of rape should adequately reflect the revulsion felt by the great majority of society.

[17] It is incumbent upon a judge to impose a just and appropriate sentence in rape cases to inspire the public confidence in the rule of law. The judge's duty to uphold the rule of law is of particular importance when the judge is dealing with the laws which protect the community from crime, such as rape cases. In this context the judge's preliminary responsibility is the protection of the public. The community must be protected from crime, and, where the exercise of this responsibility arises, the judge should have public protection at the forefront of his mind.

[18] The concept of rule of law is not mere legal gobbledygook. Perhaps it is not out of place in this context to remember the force of words attributed to Thomas More by Robert Bolt, chiding his son-in-law:

> This country's planted with laws from coast to coast — and if you cut them down — do you really think you could stand upright in the winds that blow them?

(See Speech by Sir Igor judge President of the Queen's Bench Division, 'Public Protection', Lecture at King's College London, Monday, 20 November 2006).

CONCLUSION

[19] With respect, I am of the considered view that the sentence of 24 months imprisonment and one stroke of cane passed by the SCJ was manifestly inadequate and also was not in line with the established sentencing principles in relation to rape cases.

[20] For the reasons adumbrated, I find that the learned SCJ had erred in principle in imposing the sentence he did on the respondent. Accordingly, the

sentence imposed by SCJ is set aside and substituted with a sentence of 12 years imprisonment and three strokes of cane. The term of imprisonment is to run from the date of conviction on 17 February 2011.

Order accordingly.

Reported by Kanesh Sundrum